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November 17, 2000

Mr. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K St. NW  
Washington, D.C. 20423-0001

**Via Hand Delivery**

Dear Mr. Williams:

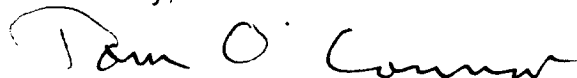
In response to the Notice of Proposed Rulemaking (NPR) issued by the Surface Transportation Board (STB) on October 3, 2000 in Ex Parte 582 (Sub-No.1), Major Rail Consolidation Procedures, enclosed are the Comments of Williams Energy Services and the accompanying Verified Statement of Tom O'Connor.

We have provided the original and 25 copies of the filing, as well as an electronic version in WordPerfect 7.0.

We would appreciate it if your staff would date stamp the second copy of this letter for return to us. Should questions arise, please call me at (202) 371-9149.

Thank you.

Sincerely,



Tom O'Connor  
Vice President

ENTERED  
Office of the Secretary

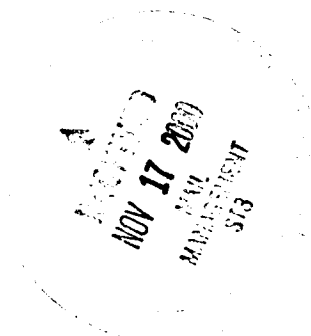
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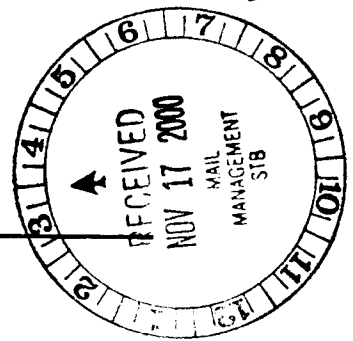
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**ORIGINAL**



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BEFORE THE

SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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COMMENTS OF WILLIAMS ENERGY SERVICES

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And Verified Statement of

Tom O'Connor

Snavelly King Majoros O'Connor & Lee, Inc.

1220 L St. NW

Washington, DC 20005

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Ex Parte No. 582 (Sub-No. 1)

Williams Energy Services

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 582 (Sub-No. 1)

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STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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COMMENTS OF WILLIAMS ENERGY SERVICES

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Williams Energy Services, by Counsel, respectfully submits these comments in response to the Surface Transportation Board's (Board or STB) Notice of Proposed Rulemaking (NPR), served October 3, 2000.

Williams Energy Services (Williams Energy Services, or Williams) is a major shipper by rail, truck, waterway and pipeline in the US and Canada. We account for more than 30,000 rail shipments annually.

## **Introduction**

While the policy statements in the NPR show promise that the Board is recognizing the weaknesses of its past merger reviews, the implementation provisions are far from adequate. The need for fundamental change in the Board's policies toward rail competition in general and rail mergers in particular is evident in the responses filed thus far in this proceeding. A summary of such responses is included as Exhibit A to the attached Verified Statement of Tom O'Connor. Mr. O'Connor's statement and the statements of many other parties to this proceeding, including railroads, shippers and governmental agencies, call for change in key areas including:

- **Enhanced Competition**
  - Open gateways and limited open access
  - Provisions to allow challenges to bottleneck rates
- **Service Assurances**
- **Three phased merger review and approval process**
- **Greater merger implementation and oversight responsibilities for the Secretary of Transportation, assisted by an Advisory Panel reporting to the Secretary**

The NPR appears to address the issues, but in fact it fails to prescribe or apply meaningful changes to serious structural, competitive and service problems that the vast majority of the commenting parties -- and the STB itself -- now recognize. If the NPR were to be adopted as proposed, the resultant merger process would not adequately protect, let alone enhance, competition, nor would it prevent recurrence of the transportation collapse experienced in recent mergers. To a large extent, the NPR merely enumerates tasks the applicants already carry out in merger applications.

The NPR fails to address altogether several well-recognized and compelling needs. For example, the NPR does not deal with the critical requirement to demonstrate, prior to the implementation of the operational merger, that the combined system will function effectively. Based on the experience of two disastrous mergers, this failure does not bode well for either the railroads or the shipper community. Nor does the NPR consider adequately the legitimate rights of shippers for recovery of financial losses they incur as a result of merger-related disruptions.

If the tepid regulations proposed by the STB are adopted, shippers and other affected parties will have gained little, notwithstanding the generally desirable policy objectives stated in the NPR.

Williams sees real potential for improvement in the Board's statements of policy objectives. To help realize that potential, Williams offers constructive suggestions that apply the otherwise largely dormant policy initiatives. We do this through specific recommendations that implement forcefully the policy goals to enhance competition, to improve service and to provide greater shipper protection.

## **Enhanced Competition**

The NPR recognizes that mergers must not threaten competition, but should enhance it. In its general policy statement, §1180.1, the Board states that it will not favor consolidations that reduce railroad and other transportation alternatives to shippers unless there are substantial and demonstrable public benefits that cannot otherwise be achieved.

The Board appears to acknowledge that the most likely effect of a merger is the exact opposite, to reduce competition. We offer simple and effective remedies for this and other serious problems surrounding rail mergers.

1. **The Rules Should Adopt a Rebuttable Presumption that Further Class I Rail Mergers Are Contrary to the Public Interest.**

As discussed in the accompanying Verified Statement of Tom O'Connor, Williams recommends that the Board adopt the proposal of the U.S. Department of Agriculture that there be a "rebuttable presumption" that any further mergers will increase concentration and market power and reduce competition. The "rebuttable" aspect of this proposal does not close the door on further mergers, but it establishes as the threshold requirement that the applicants must demonstrate that their merger benefits the public, not just themselves.

2. **Merger Applications Should Be Conducted in Three Phases, the First Phase to Establish a *Prima Facie* Case for Public Benefit.**

In our opening and reply comments, Williams proposed that the Board establish a three-phased procedure for evaluating and approving merger applications. The first phase would be the corporate merger, where the Board would approve the ownership, management, and financial arrangements of the consolidation. The second phase would consider the business aspects of the merger, addressing the issues of competition, labor protection, and changes to routing patterns. The final phase would be the operational merger, which would proceed according to carefully planned and staged implementation programs designed to protect shippers from disruptions such as have enmeshed them in recent mergers.

As discussed in more detail in these comments, Williams continues to advocate a three-phased approval process. We have done additional work on defining the objectives of the first phase and its outcome would be somewhat different than we originally proposed. The first phase, rather than consider the overall corporate structure of the consolidation, should address only the public interest aspects of the merger. In this phase, the applicants would be required to establish a *prima facie* case that the merger would yield more in public benefits than it would cost in lost competition. The applicants need not present a detailed plan for enhancing competition, but they would be obliged to demonstrate that they have a meaningful and aggressive approach to this issue, one which has a reasonable prospect of success.

This would be an open proceeding, and other parties – railroads, shippers, labor organizations, and governmental bodies – would be invited to submit evidence supporting or opposing the proposed merger. The applicants, of course, would have the right to rebut opponents, and the Board would then render a judgment based on this record. The judgment, however, would decide only whether the applicants have sustained their burden of proof that the merger may be in the public interest. Disapproval would amount to

dismissal of the application. Approval would advance the application to the second phase, that of detailed evaluation.

The virtue of this initial phase is that it could save the Board, the applicant railroads, and all other interested parties a great deal of time and effort. It is unnecessary to devote resources to complex and costly traffic diversion and competition studies if the application is fundamentally flawed from a competitive point of view. It is a waste of the Board's limited resources to consider the detail of a merger when the overall structure of it is unacceptable. In agreement with the US Department of Agriculture, this phase of the review proceeds from a presumption that a Class I railroad merger is not in the public interest.

In his verified statement, Mr. O'Connor discusses the specifics that would implement this "rebuttable presumption" approach to future mergers.

**3. In the Second Phase, the Railroads Should Be Obligated to Identify Every Major Instance of Reduced Competition and to Propose Remedial Measures.**

Proposed § 1180.1(c)(2) requires the applicants to propose remedies to mitigate and offset "competitive harms" and to explain how they would, at a minimum, preserve competitive options. This requirement is implicit in the current merger application requirements and it has resulted in rather broad and, in Williams' opinion, inadequate treatment of competitive threats in past mergers.

We recommend a strong implementation of the Board's pro-competitive policy: an explicit requirement for the applicants to identify with specificity each and every major instance of reduced competition, with a concomitant requirement to propose a specific remedy for each such situation. In this matter, individual shippers will be guaranteed protection from the loss of competitive alternatives that inevitably flow from the merger of Class I railroads. This provision will also force the railroads to develop creative solutions to the anti-competitive aspects of their consolidations. Mr. O'Connor proposes the specifics that would implement this requirement.

**4. Shippers and Other Parties Should Have Equal Standing with the Applicants in Identifying Competitive Losses and Recommending Solutions.**

One of the more discriminatory aspects of past merger proceedings is that the applicant carriers have too often been the authors of the strategies for ameliorating the anti-competitive impacts created by their own consolidations. Even when they do not conceive of the resolutions, they frequently appear to wield effective veto power over them.

Williams submits that shippers are far more sensitive to the anti-competitive impacts of mergers than are the applicant railroads. Certainly, they have more incentive to resolve those impacts in ways that not only preserve, but also enhance competition. For this reason, Williams proposes that shippers, Class II and III railroads, the recommended Advisory Panel and other affected parties should be afforded equal status with the applicants when it comes to identifying competitive harms and recommending strategies to ameliorate them. This provision should be written into the rules, not just assumed, and Mr. O'Connor's Statement provides some specifics to accomplish this purpose.

**5. The Rules Should Specify a Broader Range of Strategies for Preserving and Enhancing Competition.**

Proposed § 1180.6(b)(10) requires the applicants to explain how they will preserve competitive options for shippers and Class II and III railroads. It mentions three strategies: preservation of existing gateways, potential build-outs and build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

Williams has no objection to the three ameliorative strategies suggested in this proposed rule, but the list is by no means comprehensive or complete. Of concern to Williams is the possibility that the railroads will assume this list comprehends all the approaches they need consider. Mr. O'Connor recommends additional procedures for enhancing competition such as reciprocal switching, "interswitching," shared asset areas, competitive line rates, haulage and trackage rights, and other pro-competitive measures.

**6. The Board Should Initiate Separate Inquiries into Its Competitive and Shipper Protection Policies.**

In several of their comments, the railroads have argued that many of the issues raised by shipper parties are not discrete to mergers but relate to broader issues of competitive relationships among carriers and the rights of shippers to regulatory redress. In this regard, the railroads may have a point. As Mr. O'Connor points out, many of the monopolistic abuses that shippers suffer are the results of past mergers where shippers who previously had the choice of three or four carriers are reduced to two or, more often, one. Here, the merger damage is already done, and the issue becomes one of reversing its effect. Vice Chairman Burkes rightly calls attention to this in his comments calling for the Board to consider "upstream effects", the effects of newly proposed mergers on conditions applied to preserve competition in past mergers. We agree that the Board should consider both these "upstream effects" as well as the downstream effects of a proposed merger.



## a. Bottleneck Rates

One of the most effective and simplest ways to reverse the damage from past mergers is for the Board to adopt a more pro-competition policy toward bottleneck rates. To date, the Board has imposed insuperable obstacles to shippers seeking relief from confiscatory rates for route segments where they are totally captive to a single carrier. A change in Board policy to acknowledge shipper grievances would be a major improvement in the effectiveness of the competitive rail market. Such change coincides with a broad policy shift toward greater competitiveness and shipper empowerment.

Arguably, the Board does not need to convene a special proceeding to effect this change in policy. It could do it on a case-by-case basis. This approach, however, invites discrimination among shippers depending on the outcome of specific cases, and likely would result in *ad hoc* policies that lack cohesion and a clear and articulated rationale. A far better procedure would be for the Board to convene a generic proceeding to examine the standards of reasonableness for bottleneck rates where the railroad is in a position to exercise monopoly pricing power.

## b. Multi-Railroad Solutions

While the Board's proposed rules require the applicant railroads to propose strategies for enhancing competition, these proposals will necessarily be constrained by the fact that only the merging systems can offer the concessions that might increase shipper choice. The merging railroads have no power to recommend solutions that would affect non-merging lines, other than to permit them greater access to their own customers. While such proposals may enhance competition, they are unlikely to occur since they result in the merging railroads offering all the concessions, and the non-merging lines offering none.

For this reason, Williams recommends that the Board convene independent inquiries at the time it examines the next merger to consider industry-wide reforms that would enhance competition broadly, not just within the context of the merging railroads. These reforms would deal with rights of access, reciprocal switching zones, competitive rate plans, and the rights of shippers to appeal against unreasonable rates and terms of service.

## c. Shipper Protections

One of the major omissions from the NPR is the absence of any specific remedies for the damages that shippers experience from merger related disruptions. Experience has shown

those damages to be inexorable and persistent. Compensation has been uncertain and even more prolonged.

## **1. The Board Should Establish Rules for the Filing, Processing and Resolution of Shipper Complaints against Merger-Related Disruptions.**

Williams has experienced severe disruptions to its own operations from recent mergers which have caused increased costs, decreased service and lost sales. Yet there has been no recourse other than costly and time-consuming litigation in court. The Board should establish rules and procedures by which shippers could receive prompt resolution of their complaints against merging railroads. The rules would prescribe procedures for the filing of complaints, establish appropriate investigative and adjudicatory entities (presumably representatives of the Board), and set forth the basis for compensation to aggrieved shippers. Alternatively, the Advisory Panel could have a role in establishing benchmarks and compensation standards.

The establishment of shipper protection and grievance procedures specifically for merger-related damages would act as a further inhibition to mergers. That is not necessarily bad since it creates an offsetting consideration for railroads that might be tempted to merge solely for purposes of increasing their market power. It is consistent with the general philosophy, articulated in the Board's regulations and emphasized in these comments, that mergers should be allowed only if they generate very substantial and tangible public benefits.

## **2. An Advisory Panel Should Be Established to Develop Shipper Protections Rules and Standards.**

Obviously, any rules that deal with shipper protection, grievance procedures, and damage compensation will be highly contentious. The railroads have a legitimate right to protection from frivolous, arbitrary and unreasonable sanctions. They are also entitled to an impartial finding as to whether an alleged shipper grievance in fact relates to merger effects or to totally unrelated factors, including the shipper's own actions.

In light of the complex and contentious issues involved, it would be inappropriate for Williams (or any other commentator) to propose specific rules in this round of comments. Indeed, no one party - arguably including the Board - should seek to establish unilaterally a set of shipper protection procedures and standards.

In his Verified Statement, Mr. O'Connor has proposed the creation of an Advisory Panel reporting to the Secretary of Transportation to develop further refinements in, and applications of, the Board's proposed merger rules. The Advisory Panel would be

composed of representatives of shippers, railroads, and the Board. One of the first items on the agenda of this group should be shipper protection, grievance procedures and compensation standards.

Williams recommends establishing a specific time limit, say, six months, for this Advisory Panel to render its report to the Secretary and, through the Secretary, to the Board. When presented by the Secretary, such recommendations would be binding on the Board in the absence of compelling evidence to the contrary.

## **7. Conclusion**

In each of the foregoing areas the need for an effective remedy is clear. Simply stated, if the NPR were adopted as proposed by the STB, we risk recurrence of a transportation collapse such as resulted from recent mergers.

The numerous respondents supporting changes similar to those recommended by Williams show widespread agreement on the need for change. Exhibit A to Mr. O'Connor's statement summarizes the support for change in key areas.

Williams Energy Services urges the Board to adopt the recommendations we have outlined in these Comments and the accompanying statement. The Williams Energy Services action plan and initiatives can help rebuild a strong, competitive and sustainable rail system, benefiting the entire economy.

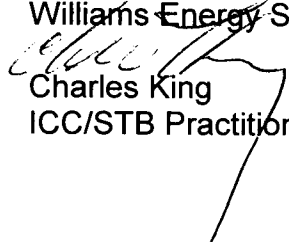
**In summary the recommended initiatives include:**

- **Actions that implement the STB decision to enhance competition**
- **Adoption of a 3-phased merger review and approval process**
- **Procedures to prevent and recover economic losses caused by service failures**
- **A stronger rail merger implementation and oversight role for the Secretary of Transportation, including an empowered Advisory Panel reporting to the Secretary of Transportation**

# Williams Energy Services

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Respectfully Submitted  
Williams Energy Services, by

  
Charles King  
ICC/STB Practitioner\*

\*Admitted to practice June 2, 1967

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**Before the Surface Transportation Board**

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**Response to**

**Notice of Proposed Rulemaking**

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**in**

**STB Ex Parte No. 582 (Sub-No. 1)  
Major Rail Consolidation Procedures**

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**Filed on Behalf of**

**WILLIAMS ENERGY  
SERVICES**

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**VERIFIED STATEMENT OF**

**Tom O'Connor**

**Vice President  
Snively King Majoros O'Connor & Lee, Inc.  
1220 L St NW  
Washington DC 20005**

**November 17, 2000**

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**Ex Parte No. 582 (Sub-No. 1)**

I. EXECUTIVE SUMMARY.....12

Approach ..... 12

II. RECOMMENDED ACTIONS ..... 14

1. The STB should implement pro-competitive modifications..... 15

2. The STB should adopt a rebuttable presumption that further mergers are against the public interest..... 19

3. The STB should segment the merger review process into three sequential phases..... 21

4. The STB should benchmark adequate service and ensure shipper compensation for reduction and loss of rail service caused by mergers..... 24

5. An Advisory Panel should be created to provide timely and objective assistance during merger review and implementation. .... 30

III. SUMMARY.....32

IV. EXHIBIT A: SUMMARY OF RECOMMENDATIONS OF OTHER PARTIES.....33

Open Gateways ..... 34

Competitive Access ..... 34

Bottleneck Rates..... 35

Implementation Plan ..... 35

V. QUALIFICATIONS AND CERTIFICATION.....36

## I. EXECUTIVE SUMMARY

My name is Tom O'Connor. I am Vice President of the economic and management consulting firm of Snavelly King Majoros O'Connor & Lee, Inc. I have served as an economist with the Interstate Commerce Commission (ICC), the United States Railway Association (USRA), Conrail, the Association of American Railroads (AAR) and two consulting firms, including my present firm. A summary of my qualifications appears in Section V.

Williams Energy Services retained my firm to review the record of this proceeding and to analyze the Surface Transportation Board's (Board or STB) present and prospective role in the impending consolidation of the railroad industry. In the Opening Statement, Reply Statement and in this response to the STB Notice of Proposed Rulemaking (NPR), we have developed, in collaboration with Williams Energy Services, recommendations on rule revisions designed to retain and enhance existing rail competition while avoiding the service disruptions that have characterized recent rail mergers.

We have studied carefully the NPR issued by the STB on October 3, 2000 and the Opening and Reply comments filed by the numerous respondents to this proceeding. In this response, we build on the work already done by the STB, by Williams Energy Services and by numerous respondents.

We focus on a limited set of central issues; issues with far reaching effect on the rail industry, our industry and the US economy. They include:

- **Enhanced competition**
- **Adequacy of service**
- **The merger review and approval process**
- **Merger implementation and oversight responsibilities**

The interaction of rail policy and economic strength is evident throughout the responses to this proceeding. A strong and competitive rail system is essential to the economy. While the need for change in the existing merger procedures is also widely recognized and despite the STB's recognition of many of the key issues, the NPR fell short of meaningful change.

### Approach

Our recommended remedies are developed through a four-step process:

1. Summarize the key issues, review the NPR treatment of those issues and develop recommended STB actions.

2. Review the responses of the parties to this proceeding and highlight issues with widespread support for change in the existing or proposed merger guidelines. Exhibit A to this filing notes the numerous respondents who support key points of our recommendations, centering on the following areas:
  - **The Critical Need for Enhanced Competition**
  - **Open Gateways**
  - **Challengeable Bottleneck Rates**
  - **Implementation Plan and Merger Oversight**
3. Build on the apparent STB intentions as articulated in the NPR, by outlining actions to implement the new STB policies.
4. Develop specific remedies and, in some cases, specific language for meaningful action by the STB, applying the STB policy changes in specific action steps.

***Benefits of Recommended Actions*** The railroads, shippers and the economy will realize significant benefits from the recommended actions. Enhancement of competition is an example of a key area benefiting all of these groups and the STB recognizes the need for change in this area. Williams and many others support the much-needed enhancement to competition.

While the STB endorsed enhancement of competition, additional action is required. While the STB NPR may appear to address the issues, it fails to prescribe or apply meaningful changes to serious problems recognized by the vast majority of the parties and by the STB itself. If the NPR were adopted as proposed, the resultant merger process would not prevent recurrence of the transportation collapse experienced in recent mergers

Although it may appear that the STB took major strides forward, in fact the STB stopped well short of meaningful change. At the detail level, the NPR largely enumerates tasks the applicants already carry out in merger applications. In some instances the guidelines regress from existing practice. For example, except for information technology systems, the NPR does not require the applicants to prove the combined systems will work, prior to plunging into the merger at an operational level. This failure to learn from the experience of two disastrous mergers portends problems for both railroads and shippers.

In this submission we note the "good intentions" of the NPR as expressed in its policy changes and propose modifications to ensure those good intentions are realized.

One of the more promising directions of the NPR is enhancement of competition. The STB needs to implement its policy decision by specifying procedures that enhance competition. Procedures must be specified such that they can not be circumvented in application, and both large and small shippers can readily enforce them.



In numerous areas the STB recognizes the need but stops short of effective action. In the next section we identify responsive and practical action the STB could take and should take to meet the need.

## **II. Recommended Actions.**

**We propose these regulatory changes:**

- 1. The STB should implement pro-competitive modifications:**
  - Reciprocal Switching
  - Competitive Line Rates
  - Bottleneck rate challenges
  - Trackage Rights
  - Haulage rights
- 2. The STB should adopt a rebuttable presumption that further mergers are against the public interest.**
- 3. The STB should segment the merger review process into three sequential phases:**
  - (1) Corporate Merger**
  - (2) Business Merger**
  - (3) Operational Merger**
- 4. The STB should benchmark adequate service and ensure shipper compensation for reduction and loss of rail service caused by mergers.**
- 5. An Advisory Panel should be created to provide timely and objective assistance during merger review and implementation.**

**In this section we discuss each of these five areas.**

## 1. The STB should implement pro-competitive modifications.

### **Pro-competitive modifications are needed, available and should be applied.**

It is necessary to be equitable if one seeks to be effective. We have tried to follow this principle. If stringent rules are imposed on merger applicants, then the applicants could be disadvantaged relative to other non-merging railroads. Ultimately an unbalanced system works to the disadvantage of all.

#### ☐ **Enhancement of Competition, Section 1180.1 (c)**

#### **Enhancement of competition in the NPR falls short of what is required.**

As called for by the NPR, the enhancements would be proposed by the applicant railroads. In the past, applicant railroads have volunteered this type of action only to the extent required to get the application approved. In the future, absent a rule change, the applicants can be expected to continue to propose only the minimum necessary to give the appearance of complying with this requirement.

At this stage of the merger process, with end-to-end mergers virtually all that is remaining, we see limited direct impact on competition except in the choice of connecting carrier on east-west movements. Accordingly, enhanced competition is essential. Unless the STB is willing to condition approval on opening additional access to competing carriers, the proposed STB enhancement of competition modification rings hollow.

If the STB plan were adopted, virtually every major shipper would likely petition the STB for access to a competitive carrier. The predictable counter response would be the railroads or the STB picking and choosing selected locations in which to offer or prescribe competition. Without a defined set of criteria and procedures, any enhancement of competition is likely to be minimal and superficial.

- **Solution: A simple remedy is to call for all of the involved parties to propose enhancements of competition, or procedures to enhance competition. The record already established in this case identifies numerous procedures that could meet that need.**

#### ☐ **Potential harm; reduction of competition, Section 1180.1 (c)(2)(i):**

**It is a fundamental flaw that only the applicants are designated as the parties to propose remedies to offset harms resulting from reduction of competition.**

This self-policing policy is weak in design and likely to be weaker in application. The shippers, non-applicant railroads or the Advisory Panel are the parties best equipped and inclined to identify the potential harms and appropriate remedies. The STB should require shipper input and input from non-applicant railroads, the Advisory Panel and others. The STB should mandate consideration of that input by requiring a revised applicant railroad

mitigation plan, reflecting shipper and non-applicant input. STB staff, applicant railroads or the Advisory Panel might produce this revised plan.

- **Solution: The regulations should be modified to allow and encourage all of the parties to propose remedies to offset competitive harms. This could be a major area of contribution for the recommended Advisory Panel.**

**❑ Simplified Bottleneck Rate Reasonableness Tests**

**Bottleneck Rate Procedures are inordinately complex. In effect they deny access to regulatory relief.**

Williams Energy Services, and many other respondents, have called for permitting shippers to challenge bottleneck rates, regardless of the makeup of the through rate. It is clearly advisable to simplify this process by requiring that the rate for any portion of the move be open to challenge on its own merits.

Most observers agree that there is little incentive for duopolists to compete. If we have only two railroads left and they both move between a given pair of gateways, they have little incentive to compete on price between those gateways. Charging lower prices can lead to unwelcome effects from the railroad perspective. Each is implicitly aware of the possibility that price competition can grow into a price war. Charging higher prices on the other hand leads to much more acceptable outcomes from the railroad perspective. These patterns can lead to unreasonable rates.

The simplified rate reasonableness challenge could also be extended to small shipper maximum rate cases. The Advisory Panel can assist in working up the procedures for simplified and more accessible procedures. And those simplified procedures can also make it less expensive to challenge rates. Currently, the cost of a rate reasonableness test is itself unreasonable and a major impediment to regulatory access.

- **Solution: Merely allowing the shipper to review the individual revenue divisions can restrain monopolistic pricing. Combining that knowledge with a simple and accessible procedure to challenge rates that are unreasonably high will remedy many of the bottleneck rate problems.**

**❑ Limited Open Access**

**The increasing restrictions on access to competition may operate to the short-term advantage of the railroad but ultimately redound to the disadvantage of railroad and shipper.**

Many shippers are now served by only one railroad. If the remaining railroads merge into

two transcontinental systems, many shippers currently served by two carriers will see their choice effectively reduced to one. Not necessarily because the two serving carriers will merge, but because at least one of the carriers will be able to offer a single line haul to the destination. This is assuming the destination (or origin) is served by only one carrier. Only in rare instances will the shipper have both the origin and destination served by both transcontinental railroads.

In the Ex Parte 582 statements Williams Energy Services and many other respondents called for relief such as trackage and haulage rights, reciprocal switching, interswitching and competitive line rates.

Trackage and haulage rights may leave the traffic at the mercy of the railroad owning the tracks. Competitive line rates may be too difficult for the shipper to gain – more of a conceptual alternative than a real remedy.

The most practical alternatives would seem to be reciprocal switching and interswitching. However these options would be unavailable to the many sole served shippers who do not have another carrier near by.

- **Solution: It is now time to apply proven techniques to enhance competition, to prevent further losses of competitive access and to remedy the legacy of past mergers. This will involve application of remedies such as we have discussed in this statement. The design and application of such remedies to enhance competition is an area in which the Advisory Panel could assist.**

- **Downstream merger applications Section 1180.6(b)(12): Problems exist in the preferential status accorded to merger applicant railroads in analyzing and evaluating the impacts of downstream mergers.**

Estimates of downstream effects by the applicants would be largely guess work. The effect is more likely to be a heated response from the excluded railroads, than light shed on the issues.

- **Solution: Time and effort should be allotted explicitly in the procedural schedule for the comments and views on downstream effects by the non-applicant railroads, and other entities such as the Advisory Panel.**

- **Potential Benefits, Section 1180.1(c)(1)**  
The types of benefits listed in this section are basically already addressed in rail mergers. Very little of what is offered in the NPR is new.

The benefits to be shared with the shippers are limited to those in which the railroads

Nov. 17, 2000

operate in a competitive environment, at the time of the merger. This produces little benefit. As we showed in the initial filings, access to two or more competing railroads is for many shippers a situation consigned to history, long since lost in previous mergers. Accordingly, if the potential benefits are limited to situations where the railroads currently operate in a competitive environment, those benefits are largely non-existent. The result is that the benefits of the merger would tend to stay with the railroad. Lower cost to the merger applicants would tend not to be passed on to the ratepayer any more than the productivity benefits accruing today.

The end-to-end mergers now contemplated do not offer great savings to shippers unless two railroads compete on one or more segments of the movement. That condition is so rare that the STB language has only superficial appeal, and illusory benefit.

- **Solution:** Remove the constraining condition that confines the benefits to situations in which the railroads operate pre-merger in a competitive environment. Instead, apply the provision broadly and use it to enhance competition, as the STB properly called for.

## **2. The STB should adopt a rebuttable presumption that further mergers are against the public interest.**

The US Department of Agriculture (USDA) recommended that the Board adopt a "rebuttable presumption" that any further Class I mergers are not in the public interest. We agree.

As discussed in the Comments of Williams Energy Services, we endorse this suggestion as an important step forward. The STB also recognizes that the original guidelines need to be revised to meet current conditions.

### **□ Purpose of the proposed transaction Section 1180.6(b)(13):**

Nothing new has yet been proposed by the STB in this section. We see again the appearance of change and the absence of action.

The STB has thus far missed an opportunity to focus on and elevate the priority of purposes such as the public interest, enhanced competition, and maintenance of adequate service levels. The NPR gives some indication the STB will do this when they revisit this section and they are encouraged to alter the priorities, elevating the priority attached to preservation and enhancement of competition.

- **Solution: The STB must leave its passive mode and adopt a proactive pre-merger approach to identifying and solving problems. The STB must realize that the next mergers will involve coast to coast operations and larger systems. Without rigorous pre-merger testing and step-wise integration of systems, the problems will be so large in scope that they could act as an economic brake on all of North America.**

### **□ Potential harm to essential services Section 1180.1 (c)(2)(ii):**

The key in this paragraph is the definition of "essential services." And that definition is missing from the STB language. The meaning of "sufficient public need", a key concept in the NPR, is unspecified.

- **Solution: Definitions of the concepts of "essential service" and "sufficient public need" must be specified to clarify the STB's intent. Without understanding of the intent, the responses may be off point and the policy implementation may be misguided.**

☐ **Calculating public benefits Section 1180.6(b)(11):**

**The STB seems to be downplaying the importance of public benefits.**

This paragraph uses the term "where possible" twice in describing quantifying benefits. The discussion mentions detailed and accurate analysis but the actual regulations confine this to "...where possible."

- |   |
|---|
| <ul style="list-style-type: none"><li>• <b>Solution:</b>      <b>It is both reasonable and feasible that the applicants measure and report public benefits. The STB should require no less.</b></li></ul> |
|---|

### 3. The STB should segment the merger review process into three sequential phases

Phased implementation should be adopted. Consistent with our prior comments, we recommend dividing the merger application into three manageable phases:

1. Corporate Merger
2. Business Merger
3. Operational Merger

**Phase 1, the Corporate Merger.** The filing requirements for Phase 1, the Corporate Merger, would consist of all financial and organizational information, along with the estimation of the downstream effects. The STB should require generalized statements of the harm and benefits of the merger and the applicants' plans for overcoming the harms. The objective is to determine whether there is prima facie evidence that the applicants can overcome the rebuttable presumption against further mergers. If the applicants fail the preliminary test, that ends the matter. The merger application is dismissed at the outset before prolonged effort by shippers, non-applicant railroads and other affected parties.

In our prior reply comments, we suggested that the applicants should be able to go ahead and consummate a corporate merger following the Corporate Merger phase of the process. That is, they would be permitted to exchange stock, elect common directors, and begin merging the corporate entities.

Implementing this plan requires care and prior preparation of a retrograde movement, in case the combination needs to "un-merge". We suggest deferring the merger approval until Phase 2. Phase 1, the initial corporate application, is the "first test." Approval to consummate the merger should occur only after passing the Phase 2 tests in the Business Merger.

**Phase 2, The Business Merger.** Most of the requirements would be part of the second phase, the business merger application. In the Business Merger, the first event would be the market study, which identifies the competitive harms. Then one develops or determines the conditions that will resolve those harms and enhance competition. Following that would come shipper and small railroad comment. The Business Merger also includes the operational integration plans, and culminates in approval or disapproval of the merger.

**Phase 3, The Operational Merger.** Working according to a schedule established in the Business Merger phase the third, or operational, phase would apply the testing programs, the capacity measures and the detailed operational changes that would be required to



make the merging railroads operate as one.

Small railroads are a vital part of the solution, particularly during the Operational Merger. It is widely recognized that in service crises they have responded very well. We see the planning of routine operations as also benefiting from more inclusion of, and reliance on, small railroads. This phase in particular requires careful examination of the impacts of mergers on small railroads, and development of appropriate protection for these vital links in the supply chain.

- **Solution: As a condition of future mergers the merging railroads should be required to move toward the merger through a three phased sequential process:**

- 1. Corporate Merger,**
- 2. Business Merger, and**
- 3. Operational Merger.**

In each phase the railroads will test and prove their systems. The tests will be rigorous, requiring running parallel systems (their current system and the proposed post-merger system) for the entire merged operation for at least three months, or longer if needed, to demonstrate that the systems will work under both a standard and surge operational load

- Only after completing successful tests of the key systems would the merger be eligible for approval.

**❑ Evidentiary proceeding Section 1180.4(e):**

**The STB plan has a major procedural weakness in its failure to require pre-merger comprehensive and rigorous testing.**

The STB has stated the proceeding time frame as one year after the primary application has been accepted for a major transaction, 180 days for a significant transaction and 105 days for a minor transaction.

If significant problems arise, the applicants may try to handle them during the approval period. If shippers raise significant issues during the process, the STB may inappropriately defer addressing the issues due to the exigencies of ongoing operations, as they have done in the past.

The Advisory Panel we recommend would be a logical entity to have review and approval of each phase as one of its areas of responsibility. Failure to require successful pre-

merger testing, with persuasive indications that the various aspects of the individual systems will mesh, makes a repetition of past trauma almost inevitable. Williams has sustained significant damage in past mergers. We have recently been experiencing service deterioration related to the CN-IC merger.

We are not eager to repeat this experience. Repetition of drastic deterioration in service will be judged a major policy failure. It should be preventable by pre-merger testing. And the STB should require no less than the rigorous pre-merger testing and step-wise integration of systems, which we have recommended and described in detail.

- **Solution: The basic remedies are rigorous pre-merger testing and step-wise integration of systems. Step-wise integration of systems is inherent in our recommended 3-phase merger approval process.**

❑ **Applicant carriers Section 1180.3(b):**

**The NPR is unclear as to whether the revenue and expense data for non-U.S. railroads must be filed in a standard STB Annual Report R-1 format.**

Full reporting of appropriate data should not be obscured by national boundaries. The Canadian railroads have a different accounting system, and a different annual report requirement. This presents the issue of quantifying costs and benefits when they occur outside the US.

This issue needs to be addressed with requirements specified on the content and format of financial and cost data to be provided by non-U.S. railroads. Data quality and completeness should not be stopped at the border. Non-U.S. railroads that merge with U.S. railroads should be required to submit the same cost information to the STB that the U.S. railroads submit, and submit it for the entire merged network. Likewise, U.S. railroads operating outside the U.S. should be required to include the costs of those operations in their reports to the STB and other regulatory agencies. These data are needed to keep railroads on an equal footing as far as disclosing their costs.

- **Solution: If non-US railroads want to merge with US railroads they should be required to submit the same operating, financial and cost information that the US railroads submit – for the entire network, with no exceptions. Likewise, if a US railroad is doing business outside the US they should be required to include the same operating, financial and cost information for their entire network.**

**4. The STB should benchmark adequate service and ensure shipper compensation for reduction and loss of rail service caused by mergers.**

**□ Service assurance and operational monitoring, Section 1180.1(h):**

**There is no provision for pre-merger testing and review. Instead the actions of the STB are geared to post approval actions.**

This is the same failed process used in recent mergers. Due to the shrinking number of railroads, remaining mergers are critically in need of pre-merger testing. These NPR rules are an opportunity to identify and stop this type of problem before it occurs. While the STB states that it will conduct extensive post-approval monitoring, this is what the STB did in previous mergers, to little effect. Moreover, the STB has lost much of its former operational STB experience through retirements. With more retirements approaching, the issue of STB in-house expertise is raised.

Recognizing the staff limitations, the STB plans to require that the applicants establish teams to solve problems. It seems fairly obvious that these will be the same people that put the operations plan together and the resultant STB process will be largely unchanged from previous mergers. As many have noted, the record in recent mergers is rather dismal. Certainly, it is an experience that all who lived through it seek not to repeat. CSX recognized the importance of avoiding a repeat of the service problems experienced in past mergers. CSX also recognized the practical limitations of the STB's reduced staff. CSX addressed both issues by proposing that an independent and neutral outside consultant be employed by the STB, to evaluate the operating plan, at the applicants' expense. This would be handled in much the same manner that the STB's Section of Energy and Environment uses to evaluate environmental issues. This can alleviate the STB staff workload, supplement the expertise and result in a better and more timely resolution of key issues.

- **Solution: The STB must act before the merger to avert another plunge into chaos. The STB needs to take steps before the merger to reduce the chances of a repeat of the major service problems encountered in previous mergers. Williams Energy Services showed in its filing, as did others<sup>1</sup>, simple and proven ways this can be accomplished. The STB needs to revise its rules significantly and learn from, rather than repeat, the mistakes of the past.**

<sup>1</sup> See for example, Opening and Reply Comments by BASF, OXY and Williams Energy Services in Ex Parte 582 (Sub-No.1), filed May 16 and June 5, 2000.

☐ **Conditions to mitigate and offset merger harms section 1180.6(b)(10)(ii):**  
This section presents only the appearance of progress. The requirement for applicants to explain how they are going to improve service has been a part of the application process for years.

UP/SP and CSX/NS/CR all had service improvements in their applications and experience has shown that few, if any, of the planned service improvements worked as initially proposed in the operating plan

- **Solution: Comprehensive and rigorous pre-merger testing including stepwise integration of systems is the first step toward mitigating and offsetting merger harms. Unless pre-merger testing is mandated for each of the three merger phases, the past will be prologue to the future; the disastrous experience of recent mergers will repeat.**

☐ **Service assurance plans Section 1180.10(a):**  
Well intentioned but incomplete, this section specifies that the proposed operations are to be analyzed by applicants down to the route level.

The NPR should specify that proof of testing of the operating plan must be accomplished and the test results provided to the STB or interested parties for evaluation. The revised regulations do not ask the applicants to perform any more analysis than they did in previous mergers. Simply relying on sample test data, as in the Conrail acquisition, was obviously insufficient. CSX and NS provided data down to the train schedules on each route and yet major portions of the Conrail operating territory were subject to severe service disruptions. Comparing historical operating measurements to projected operations is useless unless the projected operation data has been proven to be realistic and attainable in practice.

- **Solution:** We propose two specific remedies for service failures that lead to "service damage". The first remedy is monetary and has two levels. At the first level, if rail service falls more than 20 percent below pre-merger levels, as measured by fleet utilization, the applicant railroads should be required to pay the lease costs of securing the additional equipment, required to compensate for service deterioration. These equipment costs should be paid within 30 days of presenting the bill. At the second level, if service failures cause a plant to curtail production or to shutdown, the railroad should pay those costs. Again the bill should be paid within 30 days of its being presented to the railroad
- We recommend that the Advisory Panel review and certify the "service damage" bills as being reasonable. The STB, or other court of competent jurisdiction, could rule on causation if that became an issue.
- Longer term, the only lasting remedy is restoration of service to pre merger levels. However this can take months or years. In the meantime the "service damage" bills link cause and effect, assigning financial responsibility for the service failure to the railroads causing that failure.

☐ **Service assurance plans Section 1180.10(e):**

The STB requires that information technology systems must be tested as we suggested. But this is the only facet of the transaction with this requirement.

- **Solution:** Testing should be rigorous and applied in a stepwise process to determine whether the systems to be used post-merger are capable of handling the volume of data necessary to run the merged system with no computer system failures. As a condition of future mergers the merging railroads should be required to run their current system and the proposed post-merger system in parallel, for the entire merged operation, for at least three months. This will demonstrate whether or not the systems to be used post-merger are capable of handling the volume of data necessary to run the merged system without computer system failures.

☐ **Service assurance plans Section 1180.10(i):**

Service Assurance relies too heavily on the applicants' identification of problem areas and the problems are identified too late in the process.

This section asks the applicants to identify potential problem areas. If areas are identified as potential problem areas then the anticipated problem should be corrected pre-merger. The process defaults to problem-solving in a crisis mode rather than designing a managed and controlled rail network.

- **Solution** The requirement for preventive measures and rigorous pre-testing is clear.

**□ Transitional service problems Section 1180.1(c)(2)(iii):**

**A plan should be in place with other railroads to cope with a natural disaster or service disruption**

Applicants should explain how they would cooperate with other carriers in overcoming serious service problems. When a natural disaster occurs the railroads have in the past cooperated with one another so this does not loom as a problem area. Short lines have been important in developing these solutions and their role merits more prominence in the STB regulations.

- **Solution: Service problems require agreements in place with other railroads. The applicants can and should establish such agreements as part of the application. A commitment in writing from the other railroads should be required.**

**□ Potential harm; transitional service problems, Section 1180.1 (c)(2)(iii)**

**These provisions fail to address the fact that the railroads in recent mergers were not able to see the service problems before those problems enmeshed railroad operations.**

Given the inability of the railroads themselves to foresee the problems, one wonders how the STB plans to make this determination. The NPR offers no specifics on procedures here. There is nothing in the regulations on pre-merger testing of the operations, or any other system for that matter. There is nothing on identification and establishment of pre-merger operations benchmarks. The omission is troubling since Williams Energy Services, as well as other parties, raised this point in earlier comments.

The railroads also recognize the need for pre-merger benchmarks. Such benchmarks are essential to establish baseline service levels upon which to measure post-merger operations. CN, CP and UP made this point in their filings in this proceeding.

Unless the STB deals with this issue they will have ignored the requirement to improve STB handling of service quality problems. The alternative to change is perpetuation of procedures that produced monumental service failures.

- **Solution: A well-targeted remedy was thoroughly developed in the earlier Williams filings and in other filings<sup>2</sup>. It centers on adopting a phased and simplified approach to the merger with each phase being tested and proven before moving to the next level. As noted previously, the Advisory Panel could assist in certification of successful completion of the phases**

**□ The STB should guarantee shipper compensation for service failures**

**Many shippers sustained significant costs due to service failures in past mergers.**

Learning from this experience we recommend short term and longer term remedies. First, as a short-term remedy, shippers damaged by deteriorated service and other merger problems should be compensated in monetary terms for the losses sustained. Second, the longer-term remedy is restoration of service to pre-merger or better standards.

While monetary damages should continue to accrue until service has been restored, they are not the goal. Monetary damages are not sufficient to recoup the losses sustained during a merger-related service collapse. The only lasting remedy is restoration of service. The monetary damages are designed to incentivize railroads to restore the service. Railroads recognize the problem. In their filings in this proceeding, CN, CSX and UP all recognized the issue of railroad responsibility for financial harm resulting from service failure. While the railroads may not agree with Williams on the method of compensation they do see the issue and the need to resolve it. The method we propose will resolve the issue fairly and equitably.

Many respondents called for post-merger service guarantees. The railroads generally appear to think this should be worked out in contracts. And some railroads offered complex and basically ineffective methodologies for addressing service failures.

One rather obvious flaw in the railroad position is that including service guarantees in contracts does not help the many shippers using tariff rates. Moreover, the railroads usually resist including any effective service guarantees in contracts.

The service guarantees should be reasonable – providing relief long before service disruptions threaten the operating and financial health of the shippers. As part of their merger application the railroads could be required to set aside a trust or escrow account to cover any damages that may occur as a result of the merger.

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<sup>2</sup> See Williams Reply Comments, Oxy Reply Comments and BASF Reply Comments, in Ex Parte 582 (Sub-No.1), filed June 5, 2000.

- **Solution: Service benchmarks for the time leading up to the merger should be established as part of the application.**
- **Service guarantees and damages should be set in advance (as part of the merger rules), either by the STB or by the Advisory Panel we recommend.**
- **The remedy is rigorous pre-merger testing and step-wise integration of systems within a 3 phased merger approval process.**



**5. An Advisory Panel should be created to provide timely and objective assistance during merger review and implementation.**

- ☐ **An Advisory Panel, reporting to the Secretary of Transportation, can and should help the STB with technical analyses, oversight and other issues.**

We recommend a stronger role for the Secretary of Transportation in merger implementation and oversight. This would be enabled by creation of an empowered Advisory Panel to assist during merger review and implementation. The Advisory Panel would report to the US Secretary of Transportation<sup>3</sup> and would assist the STB by developing objective and impartial recommendations on issues designated by the Secretary.

This panel must be representative and balanced to ensure objectivity and impartiality. The Advisory Panel should include railroads and shippers, both large and small, along with government representation.

The recommendations of the Advisory Panel should be binding on the STB unless subsequent compelling evidence indicated otherwise. The Advisory Panel should focus on technical issues for which the STB resources were insufficient. Typically these issues will be relatively short term in duration but substantial in scope. Examples include review of the railroad operating plans and determinations as to whether the railroad systems have been adequately tested.

The former Rail Accounting Principles Board offers a good model. The Rail Accounting Principles Board (RAPB) served a similar advisory function during the transition from regulation to a deregulation. Railroads, shippers, the ICC, and other involved parties were represented on the Board. The RAPB met its goals and improved the process.

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<sup>3</sup> If for any reason the Secretary of transportation chose not to lead and direct the Advisory Panel, it could report to The Department of Justice or the Federal Trade Commission, two agencies who routinely handle merger cases.

- **Solution:** An Advisory Panel of shippers, railroads and government representatives should be established, reporting to the Secretary of Transportation, empowered to help the STB develop and apply meaningful and effective changes to the merger rules.
- It is crucial that this Advisory Panel be representative of shippers, railroads and the public at large. Its recommendations should be mandatory in the absence of compelling evidence to the contrary.

### III. Summary

In summary, we find the proposed regulations overly, and needlessly, general in nature. They fail to implement well understood and widely recognized remedies such as pre-merger testing of the critical systems that will determine the success of the combined operations. The STB ignored many of the proven solutions presented by the parties to this proceeding.

As proposed by the STB in the NPR, the revised regulations fail to provide solutions for the problems experienced in previous mergers. The proposed regulations give the appearance of offering change for the future while perpetuating failed methods of the past.

The remedy is clear. The STB should require specific actions by the railroads centered on rigorous pre-merger testing and step-wise integration of systems within a 3 phased merger approval process. An Advisory Panel responsive to the Secretary of Transportation and empowered to deal with specific technical areas should be created to assist during the merger process.

The four key areas identified by Williams Energy Services are:

- **The Critical Need for Enhanced Competition**
- **Open Gateways and Limited Open Access**
- **Challengeable Bottleneck Rates**
- **Implementation Plan and Merger Oversight**

In each of these areas the need and the remedy are clear. The numerous respondents supporting changes similar to those recommended by Williams reinforce the clarity of both the need and the remedies. Exhibit A summarizes the widespread support for change in these four key areas.

The remedies presented by Williams Energy Services can help reverse the debilitating rail performance trends and should be adopted by the Board.

In summary the recommended initiatives include:

- **Actions that implement the STB decision to enhance competition**
- **Adoption of a 3-phased merger review and approval process**
- **Procedures to prevent and recover economic losses caused by service failures**
- **A stronger rail merger implementation and oversight role for the Secretary of Transportation, including an empowered Advisory Panel reporting to the Secretary of Transportation**

**IV. Exhibit A: Summary of Recommendations of Other Parties**

**Open Gateways**

The following parties agreed with key elements of our **Open Gateways** proposal:

Canadian Pulp & Paper  
CMA  
CSX  
• only applies this principle to  
"traditional" gateways  
Dow  
DuPont  
Glass Producers Transportation  
Council  
NITL  
PPG  
PPL Montana  
Proctor & Gamble  
Shell  
Society of Plastics Industry  
UP  
• only applies this principle to  
"traditional" gateways  
USDA  
• also discusses opening  
previously closed gateways  
USDOT

**Competitive Access**

The following parties agreed with key elements of our **Competitive Access** proposal:

Alliance for Rail Competition  
American Shortline and Regional  
Railroads  
Canadian Pulp & Paper  
Canadian Resource Shippers  
Corp.  
CMA/APC  
Consumers United for Rail Equity  
Dow  
DuPont  
Farmrail  
Glass Producers Transportation  
Council  
MRL  
MRL, I&MRL  
National Association of Port  
Authorities  
NITL  
Ohio Rail Development  
Commission  
Ports of Seattle, Tacoma, Everett  
PPG  
PPL Montana  
Proctor & Gamble  
Shell  
Society of Plastics Industry  
USDA  
USDOT  
Western Coal Traffic League  
Weyerhaeuser

### Bottleneck Rates

The following parties agreed with key elements of our

**Revision of Bottleneck Rates** proposal:

Alliant Energy Corporation  
Canadian Pulp & Paper  
CMA/APC  
Consumers Energy Company  
Consumers United For Rail Equity  
DOW  
DuPont  
Glass Producers Transportation  
Council  
NITL  
Ohio Rail Development  
Commission  
PPG  
PPL Montana  
Procter & Gamble  
Society of Plastics Industry  
UP  
USDOT  
Western Coal Traffic League

### Implementation Plan

The following parties agreed with key elements of our proposal calling for a

**Detailed Implementation Plan with Merger Oversight Mechanisms:**

Amtrak  
California Attorney General  
California Public Utilities  
Commission  
Canadian Pulp & Paper  
CMA/APC  
CSX  
• lacks mention of benchmarks  
and real-time simulation  
DME  
DuPont  
Finger Lakes Railway Corp.  
GM  
Iowa DOT  
National Mining Association  
NITL  
Port Authority of NY & NJ  
PPG  
Society of Plastics Industry  
State of NY  
UP  
US Clay Producers  
USDOT

**V. Qualifications and Certification**

**Tom O'Connor: Experience**  
**Snavely King Majoros O'Connor & Lee,**  
**Vice President (1988-Present)**

Mr. O'Connor has more than twenty-five years experience in the transportation industry. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor, in recent years has conducted analyses for the Government of Canada used to shape policy for freight transportation transport policy. He also has developed the Master Plan for Management Information Systems and computer facilities to measure, manage and monitor both rail freight and rail passenger transportation for the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula. He has created and managed numerous computerized transport management and regulatory systems and is a widely recognized expert on costing and economics.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation costing. Mr. O'Connor also has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Within the litigation arena, Mr. O'Connor has also conducted management audits of railroads, focused on identifying the cause and effect relationships underlying claimed cost incidence.

The management audits were directed toward testing the cost basis of bills submitted by major railroads.

**DNS Associates Inc.,**  
**Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies. He designed and implemented mainframe and

microcomputerized systems for analyzing rail, truck and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies. He also provided expert testimony on computerized data bases and cost systems and related rail cost issues before the Interstate Commerce Commission.

**Association of American Railroads,**  
**Assistant Vice President, Economics**  
**(1979 - 1982)**

Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted industry seminars on URCS and related economic issues.

Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of this pathbreaking rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

**Consolidated Rail Corporation,**  
**Assistant Director, Cost & Economics**  
**(1977 - 1979)**

Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry. He



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Economic and Management Consultants

Nov. 17, 2000

also finalized the design, and implemented and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the NorthEast corridor.

He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage this multi-billion dollar corporation.

**R.L. Banks & Associates Inc.,  
Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation-related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

**U.S. Railway Association,  
Manager, Local Rail Service Planning  
(1974 - 1976)**

Mr. O'Connor developed, computerized and implemented the light density lines cost analysis system, which defined Conrail. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. Mr. O'Connor subsequently appeared as an expert witness to

present and defend the operation of the USRA costing system.

**Interstate Commerce Commission,  
Economist, (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

**Education**

University of Massachusetts, Amherst, B.A.  
Economics

University of Wisconsin, Graduate Course Work,  
Economics

University of Delaware, Graduate Course Work,  
Business Management

The American University, Graduate Course  
Work, Computer Science

**Professional Organizations**

Transportation Research Board

- Former Chairman Surface Freight  
Transportation Regulation Committee

Transportation Research Forum

- Former President of the Cost Analysis  
Chapter

National Defense Transportation Association

- Member of Board of Directors, National Capital  
Chapter

Phi Beta Kappa academic honors society

Phi Kappa Phi academic honors society

**Military**


U.S. Army; Sergeant, Combat Engineers

**Security Clearance**

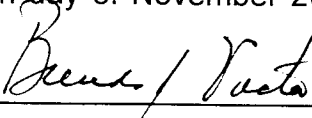
Secret

**VERIFICATION**

I, Tom O'Connor, declare under penalty of perjury that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement. Executed on November 14, 2000.

  
Tom O'Connor

Subscribed and sworn to before me this 14th day of November 2000 in the District of Columbia.

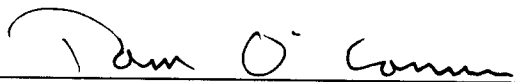
  
Notary Public

My Commission expires 3 Jan 2003

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**Notice of Service**

Copies of this Verified Statement and the accompanying Comments were served by first class mail on the Parties of Record for Ex Parte 582 (Sub No.-1).

  
Tom O'Connor

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Ex Parte No. 582 (Sub-No. 1)